

I say this because Condition 11 clearly proves that the parties had in contemplation the position when the lease was due for renewal; and it is, I think, a reasonable and the correct inference that if the sub-lessee (the defendant) intended to obtain for himself a contractual right for a sub-lease over any renewal period of the lease, he would have expressly created for himself such a right when undertaking, as he does in Condition 11, to re-transfer the leases to the sub-lessors if it should happen that "renewal" was given to him.

It would of course not be a "renewal" but provided for the position that might arise if under section 24 of the Enactment the Resident rejected the plaintiff's application for renewal and granted instead a lease to the defendant.

Again the form of a memorandum of sub-lease prescribed (Schedule X) is relevant.

Clause 3 of the form reads as follows:

"Do hereby sub-lease to the said... (a) all that portion of the said piece of mining land coloured red upon the plan hereunto attached... for the period of (b)... subject to the provisions of the Mining Enactment and to the following conditions, restrictions and exceptions:"

The foot-note (b) to the Schedule is as follows:

"(b) Add term of sub-lease, e.g., 'five years' or 'of the said lease or of any renewal thereof for which renewal the sub-lessor hereby undertakes to apply if so desired by the sub-lessee'."

Here we have the Enactment itself telling the sub-lessee what he should have inserted in the sub-lease if he wishes its period to extend over any renewal period of the lease, and this would be effective whether renewal under section 24 was given by means of an extension of the terms by endorsement or by the grant of a fresh lease.

I might perhaps also point to the reply of the defendant to the letter from the Assistant Warden of Mines dated the 20th May, 1936, inquiring if he (defendant) as sub-lessee had any objection to the renewal of M.L. 3900 to the lessee (plaintiff). Defendant's reply was that he had "no objection to the renewal of this lease to the present lessees, if they agree to renew the sub-lease on the same terms and conditions, on the issue of the new lease.

I find then that the contention of the defendant that the sub-lease is still unexpired and will not expire until the end of the extended period fails; and I hold that this sub-lease expired on 25th June, 1937.

I therefore give judgment for the plaintiff in terms of prayers (a), (b), (c) and (e) of the plaint.

*Judgment for plaintiff with costs*

# [APPELLATE CRIMINAL JURISDICTION]

CUSSEN, J.

September 7, 1940.

NG EE vs. PUBLIC PROSECUTOR.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL

No. 11 of 1940]

*Road Traffic Enactment (No. 17 of 1937), section 80—Public Service Vehicles (Conditions of Fitness, Equipment and Use) Rules, 1937, rules 3 and 65—Criminal Procedure Code (Cap. 6), section 316—Evidence Enactment (Cap. 10), section 91—Liability of conductor of Public Service Vehicle—Substitution of conviction under different charge—Evidence necessary.*

The appellant, being an omnibus conductor, was charged and convicted under section 80 (6) of the Road Traffic Enactment with having caused the omnibus in his charge to be used not in conformity with the conditions of the licence in respect of such vehicle, by conveying 17 passengers instead of 16. It was argued on behalf of the appellant that section 80 does not apply to a conductor, but only to the licensee of the vehicle: furthermore that the conditions of the licence had not been proved before the Magistrate. The Deputy Public Prosecutor asked the Court to alter the conviction to one for an offence against Rules 3 and 65 of the Public Service Vehicles (Conditions of Fitness, Equipment and Use) Rules 1937, submitting that the facts before the Court proved an offence under these rules.

Held, that the appellant, being merely the conductor of the vehicle, was not liable to be charged with any offence under section 80 of the Enactment.

The power of substitution of a conviction under a different provision of the law for the conviction found by the Magistrate is to be exercised with great caution, and only where it is clear beyond all doubt, from the nature of the offence and the record of the evidence in the case, that to do so can in no way prejudice the case of the accused. It must be clear that if the substituted charge had in fact been the original charge the proceedings at the trial would have taken the same course, and the evidence recorded been the same—that the prosecution evidence would have been unchanged (substantially) and the accused's defence the same.

In order to prove an offence under Rule 65 the prosecution must prove by admissible evidence what the authorised seating capacity of the vehicle is. This is recorded on the licence and applying section 91 of the Evidence Enactment no evidence may be given in proof of the terms of such matter except the licence or secondary evidence of its contents, when admissible. Neither the licence nor secondary evidence of its contents were in evidence before the Court, and the charge proposed to be substituted had not been proved.

*J. T. Tosswill* for appellant.

*J. F. Draper*, Deputy Public Prosecutor, for respondent.

**Cussen, J.**—This appellant was charged before the Court of the Magistrate, Raub, as follows:

"That you at about 6.10 p.m. on 11th April, 1940, at 35th mile, Lipis Road, being conductor of motor vehicle P.A. 1394 did cause such vehicle to be used not in conformity with the conditions attached to the Public Service Vehicle Licence of such vehicle by conveying 17 passengers instead of 16. Section 80 (6) and punishable under section 118 (1) Enactment 17/37".

He was convicted and fined \$30.

He now appeals against the conviction and sentence.

*Inter alia* he submits the following grounds of appeal:

- (1) That as he was not the holder of a public service licence, but only the conductor, the provisions of section 80 (6) were not applicable to him.
- (2) That there was no evidence before the Magistrate as to the conditions attached to the public service vehicle licence for the vehicle in question.

Now, section 80 (6) reads as follows:

"(6) If any person causes or permits a vehicle to be used in contravention of this section or being the holder of a public service vehicle licence wilfully or negligently fails to comply with any of the conditions attached to that licence he shall be guilty of an offence against this Enactment".

Now, in my opinion, the first half of this sub-section (6) clearly refers to the prohibition contained in section 80 (1) which is as follows:

"80 (1) No person shall cause or permit a motor vehicle to be used as a stage carriage, a contract carriage or a hackney carriage unless he is the holder of a licence to use it as a vehicle of that class in accordance with the provisions of this Part".

It is clear that the evidence on which the charge in this case is based in no way indicates or supports an offence against this sub-section.

Sub-section (5) of section 80 reads as follows:

"(5) The licensing authority may attach to a public service vehicle licence such conditions as he may think necessary...."

It is evident that it is to this sub-section that the second half of sub-section (6) refers and that offence can only be committed by the licence-holder.

I find, therefore, that the appellant is right in this ground of appeal and that, being merely the conductor of the vehicle, he was not liable to be charged with any offence under section 80 of the Enactment.

The learned Deputy Public Prosecutor for the respondent did not, as I understood him, really contest this, but he submitted that the appellant could and should have been charged with an offence against Rules 3 and 65 of the Public Service Vehicles (Conditions

of Fitness, Equipment and Use) Rules, 1937, and he now asks this Court to alter the conviction to one for an offence against those rules.

These rules read as follows:

"If any person uses or permits to be used a vehicle in contravention of or fails to comply with any of the requirements of the rules contained in Part II or Part III he shall be guilty of an offence...."

Rule 65 is in Part III which Part is entitled: "Rules governing the Use of Public Service Vehicles."

Rule 65 is:

"65. The seating capacity of a vehicle shall be calculated in accordance with the provisions of the Motor Vehicles (Registration and Licensing) Rules, 1937, and the number of passengers carried on the vehicle shall not exceed the seating capacity so ascertained:

Provided that—

- (1) children not exceeding 5 years of age who do not occupy a seat shall not be reckoned as passengers for the purpose of this rule and...."

Now, the provisions of section 316 (b) of the Criminal Procedure Code (Cap. 6) which empower this Court in an appeal from a Magistrate's Court to "alter the finding . . ." do allow of the substitution of a conviction under a different provision of the law for the conviction found by the Magistrate, to substitute the right section for the wrong section. It is, of course, a power to be exercised with great caution, and only where it is clear beyond all doubt, from the nature of the offence and the record of the evidence in the case, that to do so can in no way prejudice the case of the accused; it must be clear that if the substituted charge had in fact been the original charge that the proceedings at the trial would have taken the same course, and the evidence recorded been the same—that the prosecution evidence would have been unchanged (substantially) and the accused's defence the same.

Now, assuming for the moment that (a) the conductor of the motor vehicle is a person "using or permitting to be used a vehicle in contravention . . ." under Rule 3 (*supra*) and (b) that in this particular case it would be proper for this Court to exercise the power given under section 316 (b) of the Criminal Procedure Code (*supra*), I will examine the record of the evidence in this case to see if the necessary evidence is present to prove the offence against Rules 65.

And the second ground of appeal is relevant in this connection, i.e., that there was no evidence of the contents of the licence.

It is necessary here to refer to certain of the rules.

In the Motor Vehicles (Registration and Licensing) Rules, 1937, Rule 8 provides for the calculation of seating capacity of vehicles licensed to carry passengers for hire or reward and Rule 9 provides that the licence shall be attached to and carried on the vehicle in respect of which it is issued at all times when the vehicle is in use.

Rule 19 (ii) (b) provides that the Registrar *shall* enter upon the licence before issue thereof the seating capacity.

Rule 33 provides that the Registrar shall upon application supply free of charge to any police officer a copy of the particulars of the licence.

Again, Rule 41 of the Public Service Vehicles (Conditions of Fitness, Equipment and Use) Rules, 1937, require that the number of passengers for whom "*in accordance with these rules*" seats are provided shall be clearly marked with letters inside and outside the vehicle.

Now, it is evident that to prove an offence against Rule 65, it is necessary for the prosecution to prove by admissible evidence what the seating capacity of the vehicle is as calculated in accordance with the provisions of the Motor Vehicles (Registration and Licensing) Rules, 1937 (*supra*).

That is a matter which the law requires shall be recorded on the licence [Rule 19 (ii) (b) *supra*].

It appears to me therefore that section 91 of the Evidence Enactment applies, and that no evidence may be given in proof of the terms of such matter except the document, i.e., the licence, or secondary evidence of its contents when secondary evidence is admissible.

In this present case, neither the licence itself nor secondary evidence of its contents was in evidence before the Court.

Primary evidence of the contents of the licence would have meant the inspection of the licence itself

by the Court. Although as provided by Rule 9 (*supra*) the licence is carried on the vehicle it might be inconvenient to everybody to have the vehicle produced to the Court; but secondary evidence was easily obtainable either by a copy of the licence obtained under Rule 33 or by the oral evidence as to the contents of the licence by some person who has seen it (in this case some Police Officer).

Now, in the record of evidence in this present case no reference whatsoever is made to the licence. In fact there is no evidence to show that the vehicle in question was licensed as a "Public Service Vehicle". There is some evidence that it was a licensed vehicle because it is referred to as being P.A. 1394; but that only shows it was "licensed" but does not show it was licensed as a "Public Service Vehicle".

The prosecution rely on the evidence of one of the Police Constables that "the bus could carry 16 passengers".

That, in my opinion, apart from its obvious ambiguity, is not secondary evidence of the seating capacity as recorded in the licence. I might perhaps point out another fact in the evidence which is perhaps explanatory, though it is not necessary for me to consider it to decide this appeal, and that is that the Police Corporal witness in his list of the 17 passengers includes the name of "Ng Huat" who is the Chief Ticket Inspector of the Company. We do not know if he was in the bus on duty or not; but if he were on duty it might well be argued that he was not a "passenger" within the meaning of the rules. However, as I have said, it is not necessary for me to decide that.

For the reasons I have set out I consider that this appeal should be allowed. The appeal is allowed and the conviction and sentence set aside.

The fine is to be refunded to the appellant.

*Appeal allowed. Conviction and sentence set aside.*

